

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
JEFFERSON RIVER BASIN (41G)  
PRELIMINARY DECREE

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CLAIMANTS: Viva B. Schwab; Edward R. Schwab Sr.	<b>CASE 41G-0611-R-2024</b> 41G 23995-00 41G 23996-00
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**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

**MASTER'S REPORT**  
**FINDINGS OF FACT**

1. Claims 41G 23995-00 and 41G 23996-00 are water rights owned by Viva Schwab and Edward Schwab. The water right claims appeared in the 41G Preliminary Decree issued February 15, 2018 with DNRC issue remarks.

2. Claim 41G 23995-00 is for the purpose of irrigation use and claim 41G 23996-00 is for the purpose of domestic use. Both uses come from the same well. There is an issue remark appearing on both claims that states:

THE TYPE OF HISTORICAL RIGHT, PRIORITY DATE, AND FLOW RATE MAY BE QUESTIONABLE. THE CLAIMS FOLLOWING THIS STATEMENT USE THE SAME FILED APPROPRIATION TO DOCUMENT THE RIGHT. THE COMBINED FLOW RATE FOR THIS GROUP OF CLAIMS EXCEEDS THE TOTAL OF THE ORIGINAL APPROPRIATION. 41G 23995-00, 41G 23996-00.

Both water right claim forms identified a flow rate of 60 gpm. Attached to the statement of claim forms is Notice of Completion of Groundwater Appropriation by Means of Well. The Notice indicates the well was completed January 5, 1972, and the flow rate was 20 gpm, measured 60 minutes after pumping began.

Additionally, domestic claim 41G 23996-00 received an issue remark stating the claimed flow rate exceeds the DNRC's 35 gpm guideline.

3. The Court set a filing deadline for the claimants to address the issue remarks appearing on water right claims 41G 23995-00 and 41G 23996-00.

4. On February 2, 2024, Steven K. Schwab, the son of Edward and Viva Schwab, filed a response. Schwab points to a Well Log Report from May 1974 that is in both claim files. The Well Log Report indicates that after the well was cleaned out in May 1974, the flow rate was measured at 60 gpm. It appears that the maintenance recorded on the 1974 well log was routine in nature and did not change the dimensions of the well.

The well log is sufficient evidence to support the 60-gpm flow rate claimed by the statement of claim forms for 41G 23995-00 and 41G 23996-00. Because claims 41G 23995-00 and 41G 23996-00 are multiple uses, each is entitled to the full 60 gpm flow

rate, but they are limited by the Multiple Use information remark, which states the multiple uses of the same right “decrees the right to alternate and exchange the use of the water in accord with historical practice.” Additionally, the evidence supports the claimed 60 gpm flow rate for the domestic claim even though it is greater than the DNRC guideline for domestic purposes. A DNRC guideline does not constitute evidence and does not overcome the claimed flow rate supported by historical evidence. The issue remarks appearing on claim 41G 23995-00 and 41G 23996-00 do not overcome the prima facie status of the claims and should be removed from the claim abstracts.

### CONCLUSIONS OF LAW

1. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. § 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R. The issue remarks appearing on claims 41G 23995-00 and 41G 23996-00 do not overcome the prima facie status of the claims. The evidence submitted with the claim forms supports the claimed 60 gpm flow rate.

2. All issue remarks to claims that are not resolved through the filing of an objection must be resolved pursuant to § 85-2-248, MCA. § 85-2-248(2), MCA. However, the requirement to resolve issue remarks does not eliminate the prima facie status granted to water rights, nor does it change the burden of proof required to modify or invalidate a claim. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015. The issue remarks do not overcome the prima facie status of the claims and should be removed.

### RECOMMENDATIONS

1. The issue remark should be removed from claim 41G 23995-00 and 41G 23996-00.

Post Decree Abstracts of Water Right Claims are served with the Report to confirm that the issue remarks have been removed from the abstracts in the statewide database.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

**Service via USPS Mail:**

Viva B. Schwab  
RT 2 Box 2192  
Whitehall, MT 59759

Edward R. Schwab Sr.  
72 Yellowstone Trail  
Whitehall, MT 59759

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
JEFFERSON RIVER  
BASIN 41G**

**Water Right Number:** 41G 23995-00 STATEMENT OF CLAIM  
**Version:** 3 -- POST DECREE  
**Status:** ACTIVE

**Owners:** EDWARD R SCHWAB SR  
72 YELLOWSTONE TRAIL  
WHITEHALL, MT 59759  
  
VIVA B SCHWAB  
RT 2 BOX 2192  
WHITEHALL, MT 59759

**Priority Date:** MARCH 17, 1972

**Type of Historical Right:** FILED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** SPRINKLER

**Flow Rate:** 60.00 GPM

**Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

**Climatic Area:** 3 - MODERATE

**Maximum Acres:** 5.00

**Source Name:** GROUNDWATER

**Source Type:** GROUNDWATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWNENE	3	1N	4W	JEFFERSON

**Period of Diversion:** APRIL 1 TO NOVEMBER 15

**Diversion Means:** WELL

**Period of Use:** APRIL 1 TO NOVEMBER 15

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	5.00		NWNENE	3	1N	4W	JEFFERSON

**Total:** 5.00

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**Remarks:**

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

23995-00            23996-00

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
JEFFERSON RIVER  
BASIN 41G**

**Water Right Number:** 41G 23996-00 STATEMENT OF CLAIM  
**Version:** 3 -- POST DECREE  
**Status:** ACTIVE

**Owners:** EDWARD R SCHWAB SR  
72 YELLOWSTONE TRAIL  
WHITEHALL, MT 59759  
  
VIVA B SCHWAB  
RT 2 BOX 2192  
WHITEHALL, MT 59759

**Priority Date:** MARCH 17, 1972

**Type of Historical Right:** FILED

**Purpose (Use):** DOMESTIC

**Flow Rate:** 60.00 GPM

**Volume:** 1.50 AC-FT

**Households:** 1

**Source Name:** GROUNDWATER

**Source Type:** GROUNDWATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWNENE	3	1N	4W	JEFFERSON

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** WELL

**Period of Use:** JANUARY 1 TO DECEMBER 31

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NWNENE	3	1N	4W	JEFFERSON

**Remarks:**

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

23995-00            23996-00